LIM YEE KHEI

v.

BERJAYA TIMES SQUARE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[ORIGINATING SUMMONS NO: S7-24-2389-2002]
26 DECEMBER 2002

CONTRACT: *Sale and purchase of property - Damages for late delivery - Whether progressive payments could be set off against claim for liquidated damages - Whether assessment of damages dependant upon date of delivery of vacant possession - Whether damages due only after such date is ascertained*

The plaintiff entered into a sale and purchase agreement ('the S&P agreement') with defendant for a service suite. The plaintiff submitted that the defendant failed to deliver vacant possession on the agreed date as per the S&P agreement and claimed for various declaratory relief which included damages for late delivery under cl. 22 of the S&P agreement. The plaintiff stopped making his progressive payments after the fourth instalment and sought to set off the amount owing to the defendant against the liquidated damages for late delivery which he ascertained himself. The defendant contended that the plaintiff was required to continue making the progressive payments and that nothing in the S&P agreement allowed for a set-off as exercised by the plaintiff. Relying upon cl. 5 of the S&P, the defendant terminated the agreement.

Held:

[1] In construing the word "immediately" appearing in the said cl. 22, a reasonable construction ought to be had and it could not be considered as imposing an obligation to do what is impossible. Due regard must be given to the nature and circumstances of the case and this implied a longer or shorter period according to the facts of each case. Thus, the payment to be made by the defendant in compliance with cl. 22.2 was to be effected upon the first condition taking place, this being immediately after the delivery of vacant possession. (p 543 b-i)

[2] Whilst the defendant had delayed the delivery of vacant possession of the said property to the plaintiff, the set-off was not yet available to the plaintiff unless the period of completion had transpired. Therefore, the true nature of the amount that is claimed by the plaintiff is not essentially in the nature of a cross-claim for debt or damages that were due. (p 546 e-g)

[Plaintiff's claim dismissed with costs to follow event.]

Case(s) referred to:
Eu Kim Kee & Yang Lain lwn. Berjaya Times Square Sdn Bhd [2002] 7 CLJ 213 ***(refd)***
Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 ***(refd)***
Lee Poh Choo v. SEA Housing Corpn Sdn Bhd [1982] 1 MLJ 324 ***(refd)***
Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 ***(refd)***
Ramnarayan v. State of MP [1962] 49 AIR 93 ***(refd)***
Rao Mahmood Khan v. Ranbir Singh [1995] SC 2195 ***(refd)***
Tan Yang Long v. Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 ***(refd)***
Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn. Bhd. [2002] 4 CLJ 301 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 41

Other source(s) referred to:
Jowitt's Dictionary of Law, 2nd edn, vol 2, p 1640
Malayan Law Journal, Words and Phrases Judicially Defined, p 519

For the plaintiff - WK Leong; M/s Ajmer, Sandhu & Ong
For the defendant - VK Lingam; M/s VK Lashmi

[The plaintiff has filed an appeal vide Civil Appeal No: W-02-941-02]

Reported by M Maheswaran

JUDGMENT

Heliliah Mohd Yusof J:

The originating summons of the plaintiff sought a total of eleven declarations as well as an application for a mandatory injunction. However, the application for the injunction was withdrawn. Primarily, the claim made by the plaintiff was a right to claim for liquidated damages for late delivery of a service suite.

On 28 October 1995, the plaintiff concluded an agreement with the defendant to purchase an individual parcel of a service suite contained in the properties to be known as the Suite Towers which was being developed then by Berjaya Ditan Sdn. Bhd. (now known as Berjaya Times Square Sdn. Bhd.). The agreement contained several provisions including the completion date which was incorporated in Schedule A to the agreement (s. 7) which stipulates that the completion date was 43 months from the date of the agreement. Relevant to the case are several provisions concerning the manner of payment to be made by the plaintiff, provisions relating to default of payments by the plaintiff as a purchaser, and the clause relating to the time for handing over of vacant possession. It is pertinent to set out those clauses as subsequently, while there was no delivery of vacant possession within the period stipulated in the agreement on the part of the defendant, it was also alleged by the defendant that the plaintiff had defaulted in making payments as required under the sale and purchase agreement.

The following are the clauses which are to be noted:

3. PURCHASE PRICE AND MANNER OF PAYMENT

(1) The Purchase Price of the Premises shall be payable by Instalments at the times and in the manner provided under Schedule B.

(2) Any request or notice for payment of any of the Instalments under Schedule B by the Developer shall be supported by a Developer's Notice in writing confirming the commencement or the completion as the case may be of the relevant stage of construction ("Developer's Notice"). A duly signed Developer's Notice supported by the Commencement Certificate or Completion Certificate as the case may be shall constitute conclusive evidence that the relevant stage/s of construction therein has commenced or has been completed as the case may be. For the avoidance of doubt, the request or notice for payment for the last Instalment under Schedule B by the Developer shall be supported by a Completion Certificate. A duly signed Completion Certificate shall constitute conclusive evidence that the Premises has been duly or practically completed.

(3) The Purchaser shall pay to the Developer any Instalment/s due to the Developer within fourteen (14) days of the date of the written notice from the Developer advising that the payment of the Instalment/s is due and payable.

(4) Without prejudice to any of the Developer's rights under this Agreement including the right to terminate this Agreement in accordance with Clause 5 herein, in the event that any of the Instalment/s shall remain unpaid by the Purchaser on the Expiry Date, interest on such unpaid Instalment/s or any part thereof, calculated from day to day at the rate of twelve per centum (12%) per annum (before as well as after judgement), shall be payable by the Purchaser from and including the Expiry Date up to and including the date of full payment thereof.

5. DEFAULT BY PURCHASER AND TERMINATION OF AGREEMENT

(1) If the Purchaser:

(a) fails to pay any Instalment payable under Clause 3(1) or any part thereof and/or any late interest payable under clause 3(4); or

(b) fails to pay any sum/s payable under this Agreement within the time stipulated for payment; or

(c) commits any breach of the terms or conditions contained in this Agreement or fails to perform or observe all or any of the Purchaser's covenants herein contained; or

(d) commits any breach of the terms or conditions contained in the Deed of Mutual Covenants or fails to perform or observe all or any of the Purchaser's covenants therein contained; or

(e) before payment in full of the Purchase Price of the Premises, commits an act of bankruptcy or enters into any composition or arrangement with the Purchaser's creditors or, being a company, enters into liquidation, whether compulsory or voluntary,

the Developer may, by written notice as provided in Clause 5(3) hereof, annul the sale of the Premises and terminate this Agreement and in such an event:

(i) the Developer shall be entitled to deal with or otherwise dispose of the Premises in such manner as the Developer shall see fit as if this Agreement had not been entered into.

(ii) the Instalments previously paid by the Purchaser to the Developer, excluding any interest paid, shall be dealt with and disposed of as follows:

(aa) first, all interest calculated in accordance with clause 3(4) herein owing and unpaid shall be deducted and retained by the Developer;

(bb) secondly, an amount to be determined as follows shall be forfeited by the Developer namely:

(aaa) where up to fifty per centum (50%) of the Purchase Price has been paid, an amount equal to twenty five per centum (25%) of the Purchase Price;

(bbb) where more than fifty per centum (50%) of the Purchase Price has been paid, an amount equal to thirty five per centum (35%) of the Purchase Price;

(cc) thirdly, all costs and expenses (including legal fees on a solicitor-client basis) in respect of the termination of this Agreement and all acts done incidental thereto including the removal of any caveats lodged over the Premises by the Purchaser or the Financier shall be deducted and retained by the Developer;

(dd) lastly, the residue thereof shall be refunded to the Purchaser free of any interest.

(iii) For avoidance of doubt, all the interest paid by the Purchaser to the Developer in accordance with Clause 3(4) shall be forfeited to the Developer absolutely.

(iv) The Purchaser shall cease to have any claims against the Developer.

(2) In the event that the total of the Instalments paid by the Purchaser in respect of the Premises is less than the aggregate of the sums due to the Developer under Clause 5(1)(ii) above, the Purchaser shall upon demand pay to the Developer the Deficient Sum. Until full payment of the Deficient Sum, the Purchaser shall be liable to pay the Developer interest at the rate of twelve per centum per annum (12%) (before as well as after judgement) calculated on a day to day basis from the date of termination of this Agreement until the date of full settlement of the Deficient Sum.

(3) Upon the happening of the events listed in Clause 5(1), the Developer may give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by registered post that the Developer shall treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile the default and/or breach alleged is rectified or all of the unpaid Instalments and/or interest are fully paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

22. TIME FOR HANDING OVER OF VACANT POSSESSION

(1) The Premises shall be completed by the Developer and vacant possession of the Premises shall be handed over to the Purchaser within the Completion Date PROVIDED ALWAYS that the Purchaser shall irrevocably grant to the Developer an extension of two (2) months from the expiry of the Completion Date ("Extended Period") in the event that vacant possession of the Premises is not handed over to the Purchaser within the Completion Date.

(2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises.

(3) For the avoidance of doubt, the Purchaser hereby agrees that no claim shall be maintained or instituted against the Developer for any damages, loss, interest, costs and expenses in the event the Developer hands over vacant possession of the Premises after the Completion Date but within the Extended Period.

23. MANNER OF DELIVERY OF VACANT POSSESSION

(1) Upon the issuance of a Completion Certificate certifying that the construction of the Premises has been duly completed or practically completed and subject to:

(a) the Developer having applied, for the issuance of the Temporary Certificate of Fitness for Occupation from the Appropriate Authority/ies;

(b) the Purchaser having paid all monies payable under and in accordance with Clause 3 and all other monies due under this Agreement; and

(c) The Purchaser having performed and observed all the terms and covenants on the Purchaser's part under this Agreement,

the Developer shall let the Purchaser into possession of the Premises PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the Premises until such time as the Temporary Certificate of Fitness for Occupation for the Suite Towers is issued.

(2) Upon the expiry of the fourteen (14) days from the date of a notice from the Developer requesting the Purchaser to take possession of the Premises, whether or not the Purchaser has actually entered into possession or occupation of the Premises, the Purchaser shall be deemed to have taken delivery of vacant possession. Thereafter, any loss or damage to the Premises or any part thereof shall be at the sole risk of and shall be borne by the Purchaser.

35. SCHEDULE

(1) The Schedules and Appendices referred to herein shall form part of this Agreement and shall be read, taken and construed as an essential part of this Agreement.

(2) In the event of any discrepancy or inconsistency existing between the terms and conditions of this Agreement and the terms and conditions of the Letter of Offer, the terms and conditions of this Agreement shall prevail to the extent of such discrepancy or inconsistency.

36. WAIVER

No failure or delay on the part of the Developer in exercising nor any omission to exercise any right power privilege or remedy accruing to the Developer under this Agreement shall impair in any manner any such right, power, privilege or remedy or be construed as a waiver thereof or an acquiescence in respect to any default by the Purchaser. Such failure or delay shall not impair, prejudice or adversely affect any other or further exercise of any of the Developer's rights, powers, privilege or remedies under this Agreement.

As provided in the Schedule to the agreement the plaintiff had paid a deposit of RM29,850 which constitutes 10% of the purchase price which was RM298,500. According to cl. 22 of the agreement, the premises were to be completed by the developer and vacant possession of the premises "shall be handed over to the purchaser within the completion date" which was then

calculated to be 27 May 1999. Until the date of the filing of the plaintiff's affidavit in support of the originating summons (27 June 2002), the defendant had yet to deliver vacant possession. The affidavit of the plaintiff and the defendant disclosed that the defendant had been unable to hand over vacant possession on the date agreed upon in the agreement for the following reasons.

Sometime on or about 1997 and 1998 during the economic downturn, the development sector which was also affected, caused the property development undertaken by the defendant to be stalled. The defendant indicated that due to difficulties in cashflow, the defendant was forced to slow down the construction works on the development project and it was considered that delivery of the vacant possession of the said property could not be made in accordance with the agreement. Apparently on 9 August 1999 the defendant had circulated newsletters to all its purchasers informing the progress of the said development project as well as the likely estimation of the completion of the project by the end of 2002. The affidavit of the defendant disclosed that the plaintiff had made progressive payments right up to the fourth invoice. The progressive payment is part of the schedule of payments of the purchase price as stipulated in Schedule B to the agreement and Schedule B is as follows:

SCHEDULE B

SCHEDULE OF PAYMENTS OF THE PURCHASE PRICE

Stage	Percentage (%) Of Purchase Price	Cumulative (%)	Ringgit Malaysia (RM)
1. Upon the signing of this Agreement	10	10	29,850.00
2. Within fourteen (14) days from the date of the Developer's Notice supported by The Commencement Certificate certifying The commencement of:			
(a) earthworks	10	20	29,850.00
(b) the foundation works	10	30	29,850.00
(c) the lowest basement carpark of the Complex	10	40	29,850.00

(d) the reinforced concrete superstructure of the Premises	15	55	44,775.00
(e) the brick walls of the Premises	15	70	44,775.00
(f) the internal electrical wiring and water piping of the Premises	10	80	29,850.00
(g) the internal or external plastering of the Premises	10	90	29,850.00
1. Upon the signing of this Agreement	10	10	29,850.00
3. Within fourteen (14) days from the date of the written notification by the Developer to the Purchaser requesting the Purchaser to take vacant possession of the Premises and supported by the Completion Certificate certifying that the Premises is duly or practically completed	10	100	29,850.00
		Total	298,500.00

The fifth invoice dated 7 March 2000 was sent by the defendant to the plaintiff which was to be settled by 20 March 2000, and that was when the plaintiff took the position that the defendant was late in delivery of the premises for a period of 237 days namely from 27 July 1999 until 20 March 2000. Thus on this basis the plaintiff took the position that cl. 22(2) of the sale and purchase agreement should be invoked where it was contended by the plaintiff that the clause should be applied as follows:

> The developer shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 12 per centum (12%) per annum of the purchase price from the date of the expiry of the extended period.

In the agreement that was concluded, cl. 22(1) had stipulated in the proviso that the purchaser shall irrevocably grant to the developer an extension of two months from the expiry of the completion date in the event that vacant possession of the premises is not handed over to the purchaser within the completion date with the completion date "which is determined in Schedule A to the agreement to be a period of 43 months from the date of the conclusion of the agreement (28 October 1995)." The date of completion was therefore 27 May 1999 and with an extension period of two months under that same cl. 22 of the sale and purchase agreement, the defendant was required to deliver vacant possession within the period before 27 July 1999.

The amount that was stated in the invoice of 7 March 2000 was RM44,775. However, the plaintiff purportedly acting in pursuance of cl. 22 *vide* a letter dated 16 April 2000 offered an amount of RM22,792.32 to the defendant. This, according to the plaintiff, was the amount that he would pay to set off an amount of RM21,982.38 as liquidated damages on account of the failure to deliver. The defendant regarded this as a unilateral act which was not allowed under the sale and purchase agreement.

It would appear that subsequent to the invoice dated 7 March 2000, the plaintiff was also invoiced as follows:

	Amount (RM)
(i) 20 February 2001	44,775
(ii) 27 December 2001	29,850
(iii) 8 January 2002	29,850.

The plaintiff on his part continued to decline to pay the amount as invoiced and in turn, for each invoice decided instead to continue to take into account the delay in handing over right up to the due date for payment of the latest invoice. On this basis, the plaintiff therefore continued to calculate on his own the total liquidated damages incurred by the developer and from the net total amount payable by the plaintiff to the developer, the plaintiff then offered an amount as a set off from the instalments that were due to be paid by him to the defendant.

This also explained why the originating summons filed by the plaintiff sought relief in the curious form of several declarations whereby apart from declarations that the defendant should hand over vacant possession on or before 27 July 1999, there were several declarations whereby the plaintiff sought an amount to be paid by the defendant to the plaintiff which amount represents the difference between the amount that was due from him as payments of

instalments to be set off with the amount of liquidated damages which the plaintiff alleged was due from the defendant by calculating the number of days that the defendant had failed to deliver vacant possession (for example, when the invoice of 20 March 2000 was expected to be paid by the plaintiff to the defendant, the plaintiff sought declaration that on 7 March 2001, the defendant was late 350 days to be calculated from 20 March 2000). Thus there was an attempt by the plaintiff to have a systematic set off every time the plaintiff was invoiced by the defendant in that the amount that the plaintiff alleged was due from the defendant as liquidated damages was to be set off as against the instalment payments due to be paid by the plaintif to the defendant.

On 29 March 2002, the defendant wrote to the plaintiff to the effect that the plaintiff had failed to settle the outstanding progressive payments due and indicated to the plaintiff that his account was 736 days in arrears and *vide* that letter indicated that the outstanding progressive payments due to the defendant was then RM111,221.92. The letter also stated that the plaintiff was required to make good all outstanding sum payments and interest charges due to the defendant within 14 days from the date of that letter which was 29 March 2002. On 3 June 2002, the defendant terminated the agreement *vide* a notice of termination. The letter stated that the plaintiff had "failed to settle the outstanding sums and the defendant therefore exercised its rights to terminate the sale of the property to the plaintiff with immediate effect." The letter also stated that the total sum of RM116,122.24 paid by the plaintiff to the defendant under the previous instalments were to be forfeited as agreed liquidated damages and interest for late payment charges. The defendant also denied that it had agreed to a set off as suggested by the plaintiff and contended that the issue of set off was also not provided in any of the clauses of the agreement. It was also the assertion of the defendant that the attempt to set off on the ground that the plaintiff had a claim in liquidated damages was premature and on the basis of the failure of the plaintiff to pay the outstanding amount, the defendant invoked cl. 5 of the agreement for the purposes of terminating. The termination of the agreement was also based on the ground that the plaintiff was also in breach of cl. 3 of the agreement.

The originating summons filed by the plaintiff contains the relief sought by the plaintiff by way of declarations whereby the plaintiff set out his own computation of what should be set off from the amounts that were due from him to the defendant with regard to the instalments to be paid. The plaintiff also disputed the purported termination by the defendant. The matter rests primarily on the interpretation to be given to cl. 22 of the agreement. It is further noted that under cl. 33 of the agreement, it is provided that "time shall be the essence of the contract in relation to all provisions of this agreement."

It is found that the provisions of the agreement entitled the defendant by a written notice to terminate the agreement in event of any default of payments of instalment by the plaintiff. This has been provided for in cl. 5. It is further noted that the agreement does not contain any provision relating to a right to set off.

The defendant relied primarily on the decision in *Tan Yang Long & Anor v. Newacres Sdn. Bhd.* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666. In that case the plaintiff entered into a written agreement to purchase an apartment from the defendant. The agreement was subject to the Housing Developers (Control and Licensing) Act. The apartment which was to be ready for occupation on or before 17 March 1998 was apparently not completed even up to the time that the matter was heard. In that case Mahadev Shankar J decided in favour of the plaintiff. The court in that case had to construe cl. 13.2 of the agreement which also provides that liquidated damages of 8% of the purchase price to be paid for each day delay till actual delivery of vacant possession. The court then construed the clause to mean that liquidated damages are to be calculated from day to day which implies a right to be paid on day to day basis as long as the default continues. In *Tan Yang Long*'s case the substantial defence of the defendant as indicated in the judgment, was that the defendant had contended that the only remedy which the plaintiff has is for liquidated damages as provided by the Act and that no matter how long delivery is delayed no damages need to be paid until the day when the building is completed and vacant possession is delivered. The court found that that submission was devoid of merit.

In another case, *Eu Kim Kee & Yang Lain lwn. Berjaya Times Square Sdn. Bhd. & Satu Lagi* [2002] 7 CLJ 213, Abdul Hamid Said J dealt with another case along a similar line. In that case before the learned judge, (his judgment was completely written in Bahasa Malaysia), the plaintiff also concluded an agreement to purchase a parcel at Level 4 Berjaya Times Square, Kuala Lumpur (the premises) at the purchase price of RM1,283,900. The agreement had a similar cl. 22 which was as follows:

> 22.2 If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the premises.

In that case before Abdul Hamid Said J certain decisions were also mentioned pertaining to the construction to be given to the clause of a similar nature. Based on s. 41 of the Specific Relief Act 1950, the judge decided in favour of the plaintiff and found as follows:

Di dalam kes di hadapan saya adalah jelas bahawa perlanggaran terma dan syarat PJB telah berlaku pada 10.11.1998 apabila defendan gagal menyerahkan milikan kosong. Tetapi gantirugi yang ditetapkan ada permulaan tetapi tidak ada kesudahan atau hujungnya kerana pada masa tindakan ini dimulakan tidak diketahui bila milikan kosong akan diserahkan.

Klausa 22(1) dan (2) PJB adalah berbeza daripada klausa yang biasa. Dalam klausa 22(1) pembeli menerima bahawa milikan akan diserah dalam tempoh 39 bulan tanpa mendapat tuntutan gantirugi yang ditetapkan selepas 36 bulan. Untuk mengimbangi klausa 22(1), defendan memasukkan klausa 22(2) dengan memberi faedah 12% dan juga "... the Developer shall pay immediately to the Purchaser liquidated damages ..."

The following is observed in respect of the decision of Justice Abdul Hamid Said. Clause 22.2 in the present case is in *pari materia* as the clause considered by him. While the Privy Council case of *Loh Wai Lian v. S.E.A. Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 appeared not to have been applied by the learned judge on the basis that "... kes di hadapan saya tidak melibatkan mana-mana Akta dan Peraturan yang disediakan oleh pihak berkuasa", the learned judge did go on to state as follows:

Mahkamah Persekutuan dalam kes *Insun Development* di atas memutuskan di muka surat 196:

> It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v. Mesah* [1971] 1 MLJ at page 34 ... . But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such manner as to postpone the date of accrual of their right to sue for damages which, of course, was what happened in *Loh Wai Lian*.
>
> ...

Dalam kes di hadapan saya plaintif tidak menuntut gantirugi yang ditetapkan apabila milikan kosong diserahkan tetapi gantirugi yang terakru setakat baki harga belian Premis berkenaan. Hak menuntut dan gantirugi dapat dikira. Klausa 22.2 PJB berbeza dengan kaedah 12(1) Housing Developers Rules. Klausa 22.2 PJB tidak mengatakan "immediately after the delivery of vacant possession." Klausa 22.2 PJB mengatakan "shall pay immediately to the purchaser." Seperti diputuskan dalam kes *Insun* saya "... have regard to the particular contract."

Berkaitan hak "set-off", ianya telah diputuskan dalam kes *Lim Poh Choo*. Kes ini memutuskan "... It would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross-claim."

Di Malaysia telah menjadi lumrah kebanyakan bangunan yang dibina lambat disiapkan. Ini menimbulkan masalah kepada pembeli terutama mereka yang berpendapatan rendah. Jika plaintif dikehendaki membayar RM128,000.00 ini, maka ia terpaksa memikul beban hutang bank bertambahan. Akhirnya plaintif terpaksa mengambil tindakan Mahkamah. Ini boleh menyebabkan mereka menunggu bertahun-tahun atau pun tidak dapat bayaran langsung kerana pemaju telah gulung tikar. Demi keadilan "... manifestly unjust ..." jika Mahkamah tidak membenarkan "set-off" di peringkat ini memandangkan hak plaintif telah terakru.

Another aspect of the learned judge's decision was that no reference was made to the formula in the case before him being almost identical to the clause that was being interpreted in *Loh Wai Lian*'s case (apart from the application of the Housing Developers (Control and Licensing) Act 1970) with the difference that in the case before him as well as in the case before me the word "immediately" has been inserted after the words "the developer shall pay".

It is noted that cl. 17 in the *Loh Wai Lian*'s case did also make mention not only of the delivery of possession of the said building to the purchaser but also stipulated that the agreed liquidated damages was to be calculated from day to day from the date that the building was supposed to have been completed to the date of the actual completion and delivery of possession of the said building to the purchaser.

It is noted therefore that cl. 17 in the *Loh Wai Lian*'s case as interpreted by the Privy Council indicated a formula for the computation of the agreed liquidated damages which defined not only its *terminus a quo* (opening date) but also its *terminus ad quem* (closing date).

There is yet another case in which the very same provision was also construed ie, *Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn. Bhd.* [2002] 4 CLJ 301. In that case the declarations prayed for were:

(a) that as at 20.7.2001 the plaintiffs are entitled to damages in the sum of RM414,928.34 arising from the delay of the Defendant to deliver vacant possession of parcel No. 04-56, Tingkat 4, Berjaya Times Square ("the said premise") pursuant to the said agreement;

(b) that the Plaintiffs are entitled to set off the said sum of RM414,928.34 against the sum due and payable to the Defendant of RM128,390.00; and

(c) that the Defendant is to pay the Plaintiffs damages at the rate of 12% per annum on the sale price of the said premise from 31.7.2000 to the date of delivery of vacant possession.

The background facts of the case is also similar to the present one and the clauses considered by the court are also in *pari materia*. The learned judge Ariffin Zakaria J, as he then was, premised his decision that the core issue in the case turns on the construction of cl. 22(2) of the agreement in that case and the clause was as follows:

> 22.
>
> (2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises.

In his judgment the learned judge stated:

> It would appear that based on clause 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained. This conclusion is supported by the Privy Council case of *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.*.

In the *Toh Tiam Cheow*'s case, the learned judge did not appear to have stated that in applying the *Loh Wai Lian*'s case, consideration was to be given that the *Loh Wai Lian*'s case was also related to the application of a statute which was modified in its form by a contract. The learned judge also took into account the conduct of the parties in the *Tan Yang Long*'s case where there appeared to be a renunciation or abandonment of the agreement.

Having regard to the above, cl. 22(2) presently considered before me is certainly on all fours with the provision of the agreement considered in *Toh Tiam Cheow*'s case. I do not find however that since the present case does not involve the application of the Housing Developers (Control And Licensing) Act 1966, that the decision in *Loh Wai Lian* could not apply.

The Federal Court in *Insun Development Sdn Bhd v. Azali bin Bakar* [1996] 2 CLJ 753 had pointed out as follows:

> The obvious difference between the contract of sale in *Loh Wai Lian* and the agreement here which we consider to be most material is this: under the former, the statutory formula for the calculation of the indemnity was modified by expressly stating not only the *terminus a quo* (the opening date) but also the *terminus ad quern* (the closing date), which was the date of actual completion and delivery of possession, whereas under the latter – although there is, by cl. 18(2), also a formula for the calculation of liquidated damages – it only specifies the *terminus a quo* but not the *terminus ad quern*. In our view, this difference is a matter of critical substance.

It is obvious from the judgment of the Privy Council in *Loh Wai Lian* that but for the unusual language of cl. 17 of the contract of sale, which had provided a formula for the computation of damages payable by the developer to the buyer for delay, by defining not merely the *terminus a quo* (the opening date) required under r. 12(1)(r) of the 1970 Rules but also the *terminus ad quern* (the closing date) – not required under r. 12(1)(r) – the case would have been differently decided, for their Lordships said this (at p. 4):

> If the question is asked 'in the absence of such an express provision when would the purchaser's right of action for damages for breach of a contract accrue?', the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered.

The true nature of the decision is that it is necessary to determine what the parties had agreed upon in the terms of the contract to be construed. The formula as applied in the *Loh Wai Lian*'s case had crystallised on the basis of the reasoning expressed by Lord Oliver of Aylmerton (at p. 4) as follows:

> A construction which would import into the clause a fresh obligation on the vendor to pay the calculated amount at the end of each day would be capricious, involving as it does a series of breaches of contract as each day passes without payment being made. The whole tenor of the clause is, in their Lordship's view, that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered. If the question is asked "in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?", the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. In their Lordship's judgment, the only sensible construction of clause 17 is, as Mr. Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for.

In both the decisions in the case of *Eu Kim Kee* and *Toh Tiam Cheow*, the word "immediately" was incorporated in the formula relating to the ascertainment of late delivery damages. While the learned judge in the *Eu Kim Kee*'s case took the stance that this means the developer had agreed to pay immediately on account as the learned judge had stated that in that particular contract the undertaking was to pay immediately to the purchaser, he found that the terms in that case were distinguishable from the *Loh Wai Lian*'s case. It would appear that in the *Toh Tiam Cheow*'s case the learned judge on the other hand did not refer to the reference to the word "immediately" in cl. 22(2). Thus the question has to be addressed whether the insertion of the word "immediately" where it states that the developer shall pay "immediately" will affect the application of the *Loh Wai Lian*'s case. As stated by the counsel for the defendant when I posed the question as to whether the inclusion of the word "immediately" would change the position of the parties, reference was made to the question of the construction that had been emplaced in various decisions. In *Ramnarayan v. State of M.P.* [1962] 49 AIR 93 the word "immediately" was the subject of interpretation. In that case the court had to construe a proper interpretation of the word "immediately" which appeared in r. 10 Chap IV of the Madya Pradesh High Court Rules. The material part of cl. 10 is as follows:

> An application for leave to appeal under Clause 10 of the Letters Patent against an appellate judgment of a single Judge of the High Court shall be made in writing or orally to the judge deciding the appeal immediately after the judgment is delivered. No other application for such leave to appeal shall be entertained.

Judge Shrivastava in his judgment stated *inter alia* as follows:

> (16) The intention of Rule 10 of Chapter IV obviously is that there should be no undue delay in making the necessary application. The word "immediately" has to be reasonably construed so as not to require from the applicant something which is impossible. It is rightly pointed out by Shri Dabir that the applicant may not be able to apply immediately after the delivery of the judgment for a variety of reasons, eg, his counsel may be ill or may have gone out on the date of the judgment or the name of the counsel may not appear in the cause list so that he may not have notice about the date of the delivery of the judgment, and so on. It is true, as Rao J has observed in *Sakharam*'s case, [1956] Nag LJ 42 *(supra)*, that a counsel can soon after the arguments make up his mind as to whether it would be necessary for him to ask for leave after the delivery of judgment; but it is conceivable that he may not be able to make such a prayer for reasons beyond his control. In such cases, it appears to me that it should be open to the single judge concerned to consider the circumstances which led to the delay and, if he is satisfied that the delay was for sufficient cause he may condone it.

> (17) The word "immediately" in Rule 10 of Chapter IV should be so read as to advance its purpose, and not to defeat justice, I would, therefore answer the first question in the affirmative.

In the same case Dixit CJ made references to the views expressed by Rao J in another case where Rao J was cited as having made it very clear that the word "immediately" must receive a reasonable construction and that it cannot be considered as imposing an obligation to do what is impossible. This observation makes it very clear that according to the learned judge in giving the word "immediately" a construction, some regard must be had to the nature and circumstances of the case and the word cannot be taken as excluding altogether the possibility of any time intervening after the delivery of judgment. In other words, the import of the word "immediately" would vary with any particular case and will imply a longer or a shorter period according to the circumstances of each case. The sufficiency or insufficiency of the cause which prevented counsel from making an application without any lapse of time after delivery of judgment or even the existence or non-existence of the cause has to be considered in each case.

In the case of *Rao Mahmood Khan v. Ranbir Singh* [1995] SC 2195 the word "immediately" was also the subject of construction in a rule found in the Abolition and Land Reforms Rules 1952 in which there was a mandatory rule according to which if 25 per cent of the bid amount is not deposited immediately the land shall forthwith be again put up and sold. In other words on the failure of the purchaser to deposit 25 per cent of the bid amount immediately the land shall be resold immediately after such failure the very same day. The judgment of Faizan Uddin J contained, *inter alia*, the following observation:

> The word "immediately" therefore, connotes proximity in time to comply and proximity in taking steps to re-sell on failure to comply the requirement of deposit as first condition that is to take place within relatively short interval of time and without any other intervening recurrence. But it has to be noted that **the meaning of the word "immediately" has to be determined by the context in which it has been used and the purpose for which the statute using the words was enacted.** (emphasis added)

Counsel for the defendant in referring to the aforementioned decision contended that in construing the words "shall pay immediately", the word "immediately" should be construed in the light of the facts and circumstances of each case.

Thus having regard to the above, the payment to be made by the defendant in compliance with cl. 22.2 is to be made upon the first condition taking place namely immediately after the delivery of vacant possession.

Another issue to be addressed is the attempt by the plaintiff to set off the amount of instalments that are due from him as against the liquidated damages which he is asserting against the defendant. In the *Malayan Law Journal Words and Phrases Judicially Defined* (at p. 519) a set off is described:

> a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A cross-claim is not necessarily a set off, merely because the word used in the pleading is "set off'. Whether or not the plea is a set off it has to be determined as a matter of law and substance" *Hanak v. Green* [1958] 2 QB 9, 26.

Further on it is also stated that:

> to constitute a set off the sum of money meant as a cross-claim must from its nature and quality be such that it is proper to be dealt with as a defence to the Plaintiff's claim and not as a separate cause or matter.

Jowitt's Dictionary of Law, 2nd edn., vol. 2 at p. 1640 also explains:

> Under the Judicature Acts, 1873-75, mutual claims of any kind, whether for debts or damages, can be set off against one another; but in practice the term "set-off" is generally applied to mutual debts or claims for liquidated amounts, so that one can be deducted from the other: while cross claims in respect of damages, which are unliquidated, are distinguished as "counterclaims".

The issue of setting off the payment of instalments of the purchase price against liquidated damages had been considered in the case of *Lee Poh Choo v. S.E.A. Housing Corpn. Sdn. Bhd.* [1982] 1 MLJ 324. For purposes of completeness in examining the issue of a set off it is found necessary to set out the facts as outlined by Mohamed Dzaiddin JC (as he then was). In that case there was a claim by the plaintiff for damages for breach of contract and for delivery of Issue Document of Title and vacant possession in respect of a piece of land measuring an area of 1,680 sq. ft. known as Lot No. 25602 together with a permanent building described as a three-storey shophouse plus mezzanine floor in phase 5 for SEA Park, Petaling Jaya, Kuala Lumpur and other consequential loss. The facts are as follows:

> Briefly, the facts of the case are as follows. On January 2, 1974 by a written agreement AB1 the plaintiff agreed to purchase from the defendant the said property at the purchase price of $175,000. Under the said agreement the defendant was to complete the said building on the said property within a period of 18 months from the date of the said agreement, ie, on or before July 1, 1975. In the meantime the plaintiff continued to pay the purchase price progressively and there was a balance of 10% being the last payment due and payable by her to the defendant upon the issue of the Certificate of Fitness. It is a fact that the said building was not completed within the period stipulated in the agreement. It is a term of the said agreement that the

> defendant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said building up to the date of actual completion and delivery of possession.

It would appear that in that case under cl. 17 of the purchase agreement the building was to be completed within 18 months from the date thereof (ie, on or before 1 July 1975) and yet the said building was only completed on 16 June 1977. One of the issues that arose was whether the plaintiff can set off the last payment of the purchase price against the liquidated damages. The point that is pertinent here for the purposes of the present case was the argument of the counsel for the defendant (as mentioned at p. 328 of the case) which was as follows:

> Counsel for the defendant has submitted that the right of setting-off can only be pleaded by a defendant. He cited a number of authorities which say that a set-off may only be pleaded as a defence. The history of set-off can be found in *Hanak v. Green.* This was also considered in *Shanghai Hall Ltd v. Town House Hotel Ltd.* The defence of set-off may be raised in respect of debts or damages, whether the amount is ascertained or not and whether it is added as a counterclaim. "It may consist of a set-off of mutual debt or the setting up of matters of complaint, which if established, would reduce or even extinguish the claim or the setting up of an equitable set-off" per Moris LJ at 23 in *Hanak v. Green, supra.* Again on page 26 Moris LJ stated: "The question as what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings.

The learned judge in addressing this question stated:

> The defendant has also argued that the plaintiff was in breach of the said agreement due to her failure to comply with the demand of the defendant to pay the balance of the purchase price for $17,907.20 (AB23). This is pleaded in paragraph 1.2 of the defence. And under Clause 21 of the said agreement, if the purchaser shall fail to pay any instalment of the total purchase price or any part thereof, or any interest, then it shall be lawful for the vendor at any time thereafter to annul the sale and forthwith terminate the agreement. With respect, although this was pleaded in the defence, there was no evidence that the defendant had taken any positive steps to terminate the agreement. However, it was only about three months after the writ was filed and served on the plaintiff that the defendant's solicitors wrote to the plaintiff terminating the said agreement. This letter dated January 26, 1978 was not agreed by parties, but was only included in the defendant's bundle of documents. No witness was called to produce this letter. Be that as it may, from counsel's submission, I am of the view that the defendant did not take up this point seriously. What they are contending now is that the plaintiff's conduct by refusing to pay the last balance amounted to rescission of the said agreement. It is my finding that the failure on the part of the plaintiff to pay the balance

a does not amount to a repudiation of the contract. The reply by her (AB26) to the defendant's letter of demand (AB23) cannot be construed as her intention to repudiate. What she wanted to do was merely to set-off the amount she was entitled to as liquidated damages against the balance of the purchase price due to the defendant. At any rate, the defendant has not pleaded that the plaintiff has repudiated the contract or that the defendant has accepted b the repudiation. "The act and conduct of the defaulting party relied on as amounting to a repudiation of the contract should be clearly pleaded and it is necessary to plead and prove that the repudiation was accepted.". *Bullen Leake & Jacob's Precedents of Pleadings*, 12th Edition, p. 352.

c It would appear that the decision in that case indicates that the plaintiff at the time when she sought to set off the final instalment as against the liquidated damages was already found by the learned judge to be legally entitled at the stage of filing the claim to the liquidated damages.

As the building then was already completed and in accordance with the d agreement the Certificate of Fitness was also ready for collection, the learned judge in fact found that the plaintiff was entitled to damages calculated at the rate of 8% per annum on the purchase price from 2 July 1975 (original date of completion) to the 1 June 1976.

It was a term of the agreement that the defendant should pay liquidated damages e at the rate of 8% per annum on the purchase price for any delay in the completion of the said building up to the date of the actual completion and delivery of possession. Thus, in the light of that case it was clear that what was due from the plaintiff was just the final instalment. There was of course a difference in that the agreement itself had not provided for any extension of f time. While there is in the present case a provision for extension of time, nevertheless there has still been a delay beyond the time allowed under the extension. But in this case, the set off is not yet available to the plaintiff unless the period of completion had transpired.

g In the present case the amount that is purportedly claimed by the plaintiff is not yet due, and therefore the true nature of the amount that is claimed by the plaintiff is not essentially in the nature of a cross-claim for debt or damages that are due.

In so far as the conduct of the parties are concerned it is noted from the h exhibits attached to the affidavit of the defendant filed on 24 July 2002 (exh. "HS8") in a letter dated 4 May 2000, the defendant had expressly indicated to the plaintiff that the claim for liquidated damages, if any, was premature at that point. It would appear that there was an acceptance of what appeared to be a partial payment for the sum of RM15,235.76 but it was categorically i stated that that acceptance of a partial payment towards the amount that was

owing from the plaintiff to the defendant as instalment was in the words of the defendant "not to be construed as an admission to your claim for liquidated damages."

The defendant also on another occasion, again (through exh. "HS8"), expressed that it was not agreeable to any unilateral set off and through a letter dated 2 May 2002 (encl. 7 at p. 70) indicated that it was not willing to accept a cheque for the amount of RM28,746.58 purportedly a unilateral set off to settle the outstanding progressive payment which then stood at RM111,221.92. However, a letter dated 18 January 2002, (exh. "HS6") appended to the defendant's affidavit in reply dated 24 July 2002 had also indicated that the defendant had revised the estimated completion of the project to mid-2003. The defendant therefore had persistently refuted any attempt by the plaintiff to set off any liquidated damages claimed as against the outstanding progressive payments and also in the letter of 2 May 2002.

It is observed that in contrast to the decision in the *Lee Poh Choo*'s case the defendant had also terminated the agreement. The defendant had also shown through the letters that as a consequence of the plaintiff's failure to pay the instalments there was also repudiation of the contract arising out of the default in the payment of the instalments. This was in the defendant's letter of 2nd May 2002 (exh. "HS7") where the defendant stated that the plaintiff was required to settle the outstanding progress payment amounting to RM111,221.92 within fourteen (14) days from the date hereof failing which, "we shall deem that the sale and purchase agreement as having been repudiated by you and deemed as annulled." Pursuant to that by their letter of 3 June 2002 the defendant exercised its rights to terminate the sale of the property with immediate effect. The first paragraph of the originating summons of the plaintiff seeks a declaration "bahawa mengikut Perjanjian Jual-Beli bertarikh 28 Oktober 1995 ("Perjanjian Jual-Beli") antara plaintif dan defendan untuk suatu hartanah yang dikenali sebagai A-41-3, Berjaya Times Square ("Hartanah tersebut"), defendan dikehendaki menyampaikan milikan kosong (vacant possession) hartanah tersebut kepada plaintif sebelum atau pada 27 Julai 1999;". It would appear that this form of declaration is rather odd in view of the circumstances that the plaintiff has already been informed and is fully aware that the delivery of vacant possession cannot be performed by 27 July 1999. The relief that is sought in this form appears to be either hypothetical or in a vacuum.

In the circumstances already elaborated above the plaintiff's claim is dismissed in its entirety with costs to follow the event.